Supreme Court, U.S.
FILED
JAN 3 1989
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 88-645

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

RON ALVERADO, GORDON C. ARLT, DAVID T. BUSHEY, EDWARD K. BURSLETT, LYNN HAMMIT, DONALD JARRETT, IRA C. MARTIN, WILL MATHEWS, MICHAEL B. PARR, ART SCHMIDT AND DAVID E. YORK,

Petitioners,

v.

WASHINGTON PUBLIC POWER SUPPLY SYSTEM AND BECHTEL CONSTRUCTION, INC., AND/OR BECHTEL POWER CORPORATION,

Respondents.

SUPPLEMENTAL BRIEF TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

---

* Hugh Hafer
Cheryl A. French
Hafer, Price, Rinehart
& Schwerin
2505 Third Ave., Suite 309
Seattle, Washington 98121
(206) 728-7280
Counsel for Petitioners
* Counsel of Record

6pp

This supplemental brief is filed to bring to the attention of the Court the decision of the Eighth Circuit in Daniel Construction Co. v. Local 257, International Brotherhood of Electrical Workers, 856 F. 2d 1174, (8th Cir. 1988), which was published after the Petitioners' petition for writ of certiorari was printed and is in conflict with the decision of the Washington Supreme Court in this case. In Daniel Construction Co., the employer sought to vacate an arbitration award. The arbitrator ruled that the employer did not have good reason to discharge construction workers employed at a nuclear power plant. The employer discharged the employees when they failed to pass a psychological screening test administered as a part of the security program for the nuclear

power plant. The arbitrator ruled the psychological screening test was not a valid screen, and therefore, an employee's failure of the test was not "good reason" for discharge. Daniel Construction, 856 F.2d at 1179. Although the Nuclear Regulatory Commission requires a security plan for all nuclear power plants as a condition of licensing, including some type of screening of individuals provided with access to sensitive areas, the NRC had not approved the specific psychological screening test used by the employer. Daniel Construction, 856 F.2d at 1176-1178.

The Eighth Circuit rejected the employer's argument that "the NRC has exclusive control over the regulation of safety at nuclear power plants, and that the arbitrator's decision regarding

Union Electric's site security plan usurped the NRC's authority." Daniel Construction, 856 F.2d at 1179. The court affirmed the arbitrator's authority to adjudicate disputes that involved safety issues under the collective bargaining agreement. It held that the arbitrator's assertion of such authority was not contrary to public policy. Daniel Construction, 856 F.2d at 1180-82.

The result in Daniels Construction is directly contrary to the decision of the Washington Supreme Court in this case. As in Daniels Construction, the NRC did not require the employer to implement the testing program which it instituted. 47 Fed. Reg. 33, 980; 51 Fed. Reg. 27, 872; Pet. for Cert., Appendix D, pp. 4-5. Nonetheless, the Washington Supreme Court held that only

federal law must be considered in determining if a drug testing program is permissible on a nuclear reservation. The Washington court held state constitutional protections for privacy are preempted, as they relate to matters affecting safety in nuclear power plants. Alverado v. Washington Public Power Supply System, 111 Wn. 2d 424, 431-33 (Wash. 1988), Pet. for Cert., Appendix B, pp. 7-10. In addition to establishing a conflict between the Eighth Circuit and the Washington Supreme Court, Daniels Construction is an example of one of the many ways the scope of the preemptive effect of the Atomic Energy Act will affect employees working on nuclear power plants. Review of this issue should be accepted.

CONCLUSION

The petition for a writ of certiorari should be granted.

DATED this 29th day of December, 1988.

Respectfully submitted,

* Hugh Hafer
Cheryl A. French
Counsel for Petitioners

* Counsel of Record